UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 09 CR 666 (DLC)

GARY GELMAN,

Defendant.

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New York, N.Y.
April 4, 2014
3:34 p.m.

Before:

HON. DENISE COTE

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BRIAN BLAIS
Assistant United States Attorney

SALVATORE EMILIO STRAZZULLO
Attorney for Defendant

(In open court; case called)

MR. BLAIS: Good afternoon, your Honor. Brian Blais for the government.

MR. STRAZZULLO: Good afternoon, your Honor. Sal Strazzullo on behalf of Mr. Gelman. Good afternoon again.

THE COURT: Good afternoon. You're with?

MR. STRAZZULLO: I am with Anthony Rizzo. He is an intern at my law firm, second year student at Boston Law School, your Honor.

THE COURT: Thank you.

So we have an application for bail. I have a submission filed on April 2 in support of this bail application. There were three defendants charged I believe in connection with this investigation, each of whom pled guilty and received sentences of 57, 37, and 46 months in prison. I'm saying this so if I have anything wrong counsel will feel free to correct me.

I'd be interested in a description from the government about the sources of evidence that you will -- well, you expect to offer at trial. The trial is scheduled for May 22.

MR. BLAIS: Yes, your Honor. Just to clarify the record. In addition to the three defendants that your Honor noted from the matter that was in front of your Honor, there was a related case, docket number 10 CR 31 I believe, in front of Judge Stein that had an additional four defendants. All four of those defendants pled guilty. Sitting here today I don't know the exact sentences that they were sentenced to. The range is similar in range to the sentences that were imposed in this matter. But that was a related case stemming from the same set of facts, from the same operation of A.R. Capital. So I did want to inform your Honor of that as well.

In terms of the evidence that the government would intend to offer at trial, there would first be testimony from cooperating witnesses. The number of cooperating witnesses is still a bit up in the air. I think it would be at least two, potentially as many as four cooperating witnesses who had various roles either at A.R. Capital or at related entities and that were aware of operations at the particular entity in question.

Two would be testimony from what I will call victim witnesses, individuals who invested money at A.R. Capital with a particular understanding and then lost money as a result of the operations of that entity. Again, I can't quantify an exact number. We're still in the process of identifying, reaching out to those various victim witnesses but there were, I believe, if your Honor reviews the restitution orders in this case, in the largest restitution order there were I believe 162 identified victims. So there's certainly a large pool of victims which we could potentially tap into.

Third, would be what I would classify as documentary evidence: The offering memorandum that was issued in connection with A.R. Capital that described the investing philosophy and mechanism that would be used, which is obviously the vehicle that contains what the government alleges to be significant misrepresentations about what, in fact, occurred at A.R. Capital.

Then there would be associated records including customer records, bank records, that would corroborate the activity that took place at A.R. Capital. That's essentially the range of the government's evidence at trial.

THE COURT: What do you expect that evidence would show in terms of the defendant's role in the scheme and his knowledge?

MR. BLAIS: Yes.

We expect that the evidence would show that this particular defendant is what I would classify as an account executive. So he was essentially a salesperson at this particular firm. It was not the president of the firm or anything of that nature, but was an account executive whose responsibility it was to contact potential customers and get them to part with their money, to invest in this particular entity which purported to be a hedge fund that made certain kinds of investments that it did not, in fact, make. So his role was essentially as one of the frontline sales people who had the customer contact. I believe the complaint in this matter alleges that there was a particular victim that met directly with this defendant in New York. That individual ultimately parted with upwards of $7 million in connection with this particular scheme. So I think that's broadly what the evidence would show with respect to this defendant's particular role in the scheme.

THE COURT: I believe the defendants in the case before Judge Stein, I think there were four of them, two of them received a term of imprisonment of 87 months and two received a term of imprisonment of 63 months. My deputy just pulled this off the docket sheet. Obviously if counsel have different information they'll share.

MR. BLAIS: That is in line with our understanding. That, in fact, would suggest that the sentences in that matter were actually higher than the sentences -- so I apologize if I in anyway I didn't recall the specific sentences, but I knew they were broadly in the same range.

THE COURT: What would the government suggest the evidence at trial will show as to the length of the defendant's association with this scheme?

MR. BLAIS: It's my understanding that it would show that he was associated with the scheme for essentially the entire period that was charged in the indictment, which if I recall is approximately some period in 2002 to some period in 2006. I do believe he ended his association with the scheme at some time prior to the end of the conspiracy, but it was relatively close to the endpoint of that conspiracy. So he was not associated for the full period but it was almost the entire period.

THE COURT: Thank you.

So this is your application, Mr. Strazzullo. I just wanted to get those questions answered to give us some context as I hear your application.

MR. STRAZZULLO: Yes, your Honor.

Your Honor as you can see my client has very strong community ties. In the audience today you have family, friends, mother, wife, cousins, all here showing the community ties that Mr. Gelman does have.

In addition, your Honor, Mr. Gelman has never been in trouble before, has no criminal record whatsoever.

In regards to his surrender, your Honor, it was voluntary. When he did hear of the complaint against him and the indictment he was already in the Ukraine. For the last two years, your Honor, I've been in negotiations with Mr. Goldman in regards to getting him here surrendered. There were some problems regarding his passport being expired, getting to Kiev to get the paperwork and the travel documents to the United States. In addition, your Honor, basically he has very, very strong community ties.

His grandmother at this time is sick. He has a

14-year-old son and he couldn't be here today, your Honor, because he's on a school trip.

The potential plea, your Honor, in this case that we are discussing with the government is 46 to 57 months. To note, your Honor, before this potential plea and while he voluntarily surrendered, there was a plea on the table of 57 to 71 months, while he voluntarily surrendered. And now the potential plea that I'm in negotiations with the United States Attorney's Office is 46 to 57. So even after he voluntarily surrendered, your Honor, the plea offer has gotten better, of course, with the consent of you, Judge.

The bail --

THE COURT: No. No. I don't -- I think you're referring to a guideline stipulation. I have no role in that whatsoever.

MR. STRAZZULLO: Exactly, your Honor. Just at sentencing of course it's your determination.

The properties that are being put up by his family, your Honor, is a two million dollar unsecured bond, but two properties secured. One is a four hundred thousand dollar home and the other is a three hundred thousand dollar home. Both owned by his aunt and a dear family friend.

Your Honor, I believe that this bail package in addition with conditions and combination of conditions to secure Mr. Gelman's appearance at every court date here is substantial enough to have him released on bail pending trial. Thank you, your Honor.

THE COURT: Thank you. And the equity in those two homes?

MR. STRAZZULLO: Unencumbered, your Honor.

THE COURT: Thank you.

Anything else you want to say?

MR. STRAZZULLO: No, your Honor.

THE COURT: So, I think -- and Mr. Strazzullo you've been very frank throughout with respect to the defendant knowing of this investigation, learning of it while he was abroad, staying abroad, and then more recently over this last two-year period being in touch with you and using your services to talk with the government. And I appreciate that.

So the arrest in this case happened when?

MR. BLAIS: This particular defendant's arrest, your Honor?

THE COURT: No. The investigation.

MR. BLAIS: The investigation. I believe that the arrests were in April of 2009. Certainly the complaint I believe was unsealed on April 30. I don't know whether the arrests were a day or so after. So it may potentially have been in May, but it was in that timeframe in 2009.

THE COURT: So from 2009 to 2012 the defendant remained in the Ukraine with no effort to return. In 2012, roughly he got in touch with you, Mr. Strazzullo, and you've been in negotiations with the government since that time for his return. It's my understanding as a policy matter the government doesn't really negotiate until a defendant comes back, am I right? So the defendant had to return to really have any meaningful substantive discussions with the government?

MR. STRAZZULLO: Yes, that's true, your Honor.

But I do have in my hand a plea agreement from November 16, 2012 with the government, with Mr. Goldman, the prior AUSA on the case, in regards to the 57 to 71 months sentencing range. Thank you.

THE COURT: Does the government wish to be heard?

MR. BLAIS: Yes. Just very briefly, your Honor.

As was noted in Mr. Strazzullo's original letter to the Court, we did consent to the proposed bail package. We obviously still, given it hasn't changed, we still consent.

Obviously, a bail determination is a fairly impressionistic matter and it's a multifactor test. So no one thing can necessarily determine whether bail is appropriate in a particular circumstance.

In this particular matter, obviously weighing very strongly on one side is the long period of absence of this particular defendant. Counterbalanced against that is the defendant's community ties, as evidenced by his family being present in the area, as well as the fact that he did ultimately voluntarily surrender; he was not extradited or arrested outside of the United States. And then third is what we view, our evaluation of the strength of the particular bail package.

I can say to your Honor that the package that was ultimately presented was not the original one that was presented to us. We believe that the original package needed to be strengthened, that additional properties needed to be put up, and ultimately the package that has been presented to your Honor is one that is the product of negotiation. But we believe because it, one, involves two unencumbered properties worth together approximately $750,000, properties that are owned by -- at least one of the properties owned by a member of this particular defendant's family, I believe it's -- one of the properties is his aunt's property; that in combination with the fact that several of his family members, including his mother would be signatories on the bond, the two million dollar bond, that there would be significant financial pain that would be suffered by individuals fairly close to this defendant if he were to flee. So that, in combination, those factors in combination, was sufficient for us, after discussion within the office, to determine that it was a sufficient bail package to basically enable the defendant or to ensure the defendant's return to court.

We obviously understand your Honor's initial evaluation of the proposal. We stand by our recommendation after our evaluation of the various factors. But that's certainly what went into our evaluation of the package as a whole and our getting to a level of comfort that it was a sufficient package to ensure the defendant's return.

Thank you.

THE COURT: My concern has to do with flight here and not danger to the community. So, the issue is whether I am persuaded by a preponderance of the evidence before me with respect to these issues. And the government referred to the fact that I have to weigh a number of factors. They are set out in a statute, Section 3142(g). The nature and circumstances of the crime charged is the first factor. This is a serious enough fraud, enough money was involved, over a lengthy period of time, that I think it would be considered a serious financial fraud.

The second factor is the weight of the evidence against the defendant. Two ways to look at that. It's circumstantial evidence in the sense that -- I shouldn't say that. There may very well be direct evidence through the cooperators' testimony and through the victims' testimony, but there isn't physical proof of the kind we see in some cases of tape recordings or seized items that can't really be cross-examined effectively. So if there were a trial here, there would be the opportunity for cross-examination and argument that there might not be in some cases. On the other hand, every codefendant in evaluating the strength of the evidence against them decided to enter a plea of guilty and so I think that is some kind of assessment about the strength of the proof here. No one went to trial.

So I'd say while a mixed picture, the first two factors weigh against this bail application.

The third factor is the history and characteristics of the defendant, including family ties and community ties and past conduct. This is a mixed picture. The defendant has strong ties to individuals living here but they weren't strong enough to bring him back. He made a judgment since April of '09 to stay outside this country. There is a strong or a serious bail package being presented here by people who obviously care about the defendant and are committed to him. So it's a mixed picture in this regard, but I'd say this third factor weighs in the defendant's favor.

The fourth factor is the nature and seriousness of the danger to the community or to an individual. I'd say this factor also weighs in the defendant's favor. I don't think, at least for the short amount of time the -- between now and the time of trial that there is a real risk of danger to the community.

The range of sentences given and the description before me of the negotiations over the -- what may be a stipulated guidelines range suggests that the defendant has to be looking at serious jail time; years in jail if convicted, either through a plea or at trial. And, of course, that kind of likelihood presents a serious motive of flight and kept him abroad for all of those years. It was sufficiently strong enough to keep him abroad despite what he now says are these strong ties to people here in New York.

So, Mr. Strazzullo, with respect to these two properties.

MR. STRAZZULLO: Yes.

THE COURT: What are the owners prepared to do or what have they done to turn them over to the government?

MR. STRAZZULLO: Confession of judgments, your Honor, on both properties which would be filed in Kings County in Brooklyn and then of course --

THE COURT: As liens against the property?

MR. STRAZZULLO: Yes, your Honor. One in four hundred thousand. The other one in three hundred thousand plus. The exact value, the confession of judgments would be signed in my office later today or Monday, in regards to their encumbrance on both properties, your Honor.

THE COURT: So practically speaking -- I mean the defendant has an absolute right to go to trial to defend against these charges. A jury would decide whether or not the government carried its burden of proof at trial. But just making an assessment based on what happened with the codefendants, and that's all I have to go on -- I haven't seen any document, I haven't talked to a witness -- I have no other basis for a judgment other than what counsel are sharing with me, and that record of codefendants. What we're talking about is being out of prison for a few months.

MR. STRAZZULLO: Yes, your Honor.

THE COURT: That's what we're talking about.

MR. STRAZZULLO: And just to make it clear, your Honor. That we are very close to coming to an agreement regarding a plea that is currently on the table for Mr. Gelman.

THE COURT: Well, even if you weren't, I mean we have a trial date of May 27. So our -- he would know even if he didn't want to enter a plea, he would know soon whether or not a jury would render a verdict against him.

MR. STRAZZULLO: Yes, your Honor.

THE COURT: We're talking about a small window of time here to make a decision; either he makes a decision or a jury makes a decision one way or the other.

MR. STRAZZULLO: Yes, your Honor.

In regards to his defense, also having him out on bail, your Honor, would -- with the short amount of time, if we do go to trial, would be a positive thing for his defense in regards to the voluminous amount of discovery, the accommodations over at MDC are not the greatest in regards to physical evidence, bringing it in, making sure that he receives it with the inmate mail. So having him out would help him have a better presentation at trial with the short amount of time if Mr. Gelman does decide that he wants to go to trial.

THE COURT: Mr. Blais, are you confident you can seize these two properties immediately if the defendant flees?

MR. BLAIS: Yes, your Honor.

The process that Mr. Strazzullo described is the typical process that takes place when there's property that is pledged in support of a bail package. There's a confession of judgment that is filed in the respective county register of deeds -- or I'm not sure the appropriate title office. And then when, to the extent that there is flight, that lien -- that confession basically says that the property is the property of the U.S. Government. So it is something that we would move on and can move on very quickly if necessary.

THE COURT: And you've been satisfied with the title search?

MR. BLAIS: Yes, your Honor.

THE COURT: There's been a title search here?

MR. STRAZZULLO: Yes, your Honor.

MR. BLAIS: At least as represented to me by Mr. Strazzullo, yes, there has been.

THE COURT: You haven't seen the title search itself?

MR. BLAIS: We have not yet, simply a representation from defense counsel.

THE COURT: Do you have the title search, Mr. Strazzullo?

MR. STRAZZULLO: I do, your Honor.

THE COURT: Do you have any objection --

MR. STRAZZULLO: Not on my physically. But in my office regarding the two properties. I've discovered that both are unencumbered.

In addition to that, your Honor, the release pending trial, speaking to Mr. Blais, would probably take about five, six days, probably a week, over a week because the other guarantors need to be interviewed; and also, the two people that are putting up the properties need to be interviewed. And the confession of judgment, which they would come to my office today or Monday to sign, is basically an automatic default against the two properties. So there wouldn't be any way to reverse that automatic default. It's basically a judgment. And it's confessed to by the two individuals that are putting up the property. The only way to reverse that is for me to start a court process anew from the beginning with a summons and complaint against the government stating that it was fraudulent, that they didn't really sign, it wasn't notarized and things of that nature.

So the two confession of judgments, the second they are signed in my office either today or Monday, are automatic executed judgments against the property on the condition that eventually when the case is over and your Honor orders release or the sentence, then the two properties, once he's detained, the confession of judgments are basically terminated.

THE COURT: Well there has to be a title search to make sure that the properties are owned free and clear. And the confessions of judgment have to be filed.

MR. STRAZZULLO: Yes, your Honor, to be effective.

Of course both items I do speak about will be done before Mr. Gelman is released. Those are the conditions that Mr. Blais and I have discussed.

MR. BLAIS: Your Honor, to the extent that your Honor were to grant bail we would of course ask that it be done such that the defendant is not released until all conditions are met so that would be -- involve, as Mr. Strazzullo described, an interview by our office of each of the guarantors and approval of them by our office before they're allowed to put their signatures on the bond. That's first.

Second would be our satisfaction that the titles to the homes are properly in the names of the individuals who would be signing the bond and that the confessions of judgment have been properly filed.

And then third, to the extent that electronic monitoring were part of the release, and we certainly -- that's certainly part of the agreed-upon package, and we would of course ask that it be part of any package, there is a necessary investigation by pretrial services of the location where the defendant is to reside to ensure that there is appropriate landline phones and to install the system. And that all has to happen, and pretrial has to indicate to the government that that has happened, before we would order the defendant out for release.

So all of those conditions would have to be met to the satisfaction of the government in the manner that I've described before the defendant would be ordered for release.

MR. STRAZZULLO: Also, your Honor, if I may.

His passport has already been voluntarily -- he had paperwork, not a passport -- was already given to the FBI agents that picked him up at the airport on the date of his arrival. So all of those documents are in the possession of the government. Of course, the government can confirm them with the FBI agents that had him surrender at JFK.

MR. BLAIS: I can confirm that for your Honor. Pretrial services was in possession of his passport. At the time of the arraignment before your Honor, it is their policy when the defendant is detained to release the passport to the agency, which was done in my presence. To the extent he is actually ordered released on bail, the passport would be transferred from the custody of the FBI where it presently resides to the custody of pretrial services, as is standard when a defendant is released on bail.

THE COURT: Assuming all of that is done I will grant bail. I want to make sure the government has a copy of the title searches, that title is clear on both properties, and that the confession of judgments are filed as liens against both properties as well as everything else you've described to me.

Thank you, counsel.

MR. BLAIS: Thank you, your Honor.

(Adjourned)